

A GUAN AIK MOH (KL) SDN BHD & ANOR

v.

SELANGOR PROPERTIES BHD

B COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
MOHD SAARI YUSOF JCA
MOHD GHAZALI YUSOFF JCA
[CIVIL APPEAL NO: W-02-458-1998]
C 30 APRIL 2007

HIRE PURCHASE: Breach of agreement - Action to recover unpaid instalments - Plaintiff let an imported car to first defendant with second defendant guaranteeing repayment - Car later seized by Royal Customs' officers for default in payment of actual duty payable on car - Whether plaintiff liable - Wording of agreement - Whether plaintiff sold a car to which it had no title - Whether seizure of car frustrated contract - Contracts Act 1950, s. 57

CONTRACT: Hire purchase - Breach of agreement - Action to recover unpaid instalments - Plaintiff let an imported car to first defendant with second defendant guaranteeing repayment - Car later seized by Royal Customs' officers for default in payment of actual duty payable on car - Whether plaintiff liable - Wording of agreement - Whether plaintiff sold a car to which it had no title - Whether seizure of car frustrated contract - Contracts Act 1950, s. 57

CONTRACT: Frustration - Correct test of frustration - Plaintiff let an imported car to first defendant pursuant to hire purchase agreement entered into between them - Car later seized by Royal Customs' officers for default in payment of actual duty payable on car - Whether seizure of car frustrated contract - Contracts Act 1950, s. 57

CONTRACT: Hire purchase - Guarantee - Breach of agreement - Action to recover unpaid instalments - Plaintiff let an imported car to first defendant with second defendant guaranteeing repayment - Car later seized by Royal Customs' officers for default in payment of actual duty payable on car - Whether second defendant liable on his promise to pay since first defendant refused to pay

I

This was an appeal directed against the order of the High Court entering judgment for the respondent/plaintiff against the appellants/defendants and dismissing the first defendant's counterclaim. The first defendant placed an order with one Primakar Sdn Bhd ('Primakar') for a BMW motorcar to be imported into this country. The order form was signed on the first defendant's behalf by its managing director, the second plaintiff; the first defendant then obtained finance from the plaintiff for the purchase of the car. The plaintiff purchased the car from Primakar and let it to the first defendant pursuant to a hire-purchase agreement entered into between them, with the second defendant guaranteeing repayment. The car was later seized by officers of the Royal Customs for default in the payment of the actual duty payable on the car. Upon the first defendant's subsequent default in paying the instalments due under the hire-purchase agreement, the plaintiff brought an action against the defendants to recover the sums due under the hire-purchase agreement. The defendants' defended the action on the principal grounds that the plaintiff had sold a car to which it had no title, and that the seizure of the car frustrated the contract so that the parties' rights should be adjusted in accordance with s. 15(3) of the Civil Law Act 1956. They also brought a counterclaim for the loss suffered by the seizure of the case. The learned judge found for the plaintiff on both points and dismissed the counterclaim, resulting in the present appeal.

Held (dismissing the appeal)

Per Gopal Sri Ram JCA delivering the judgment of the court:

- (1) There was no doubt that Primakar was acting as the first defendant's agent for the importation of the car. Indeed, cl. 9 of the hire-purchase agreement made it clear that the importer or dealer should be the first defendant's agent. So, if there was any obligation to ensure that all duties payable on the car to Customs were paid, it squarely lay on Primakar. Since Primakar failed to pay the duties such failure would bind the first defendant, not the plaintiff. It followed that on a reading of the hire-purchase agreement as a whole, there was no promise by the plaintiff that it would ensure that all duties would be paid. In the absence of a clearly worded provision

- A in a hire-purchase agreement imposing such an obligation, the courts should not do so as it does not accord with commercial reality that a finance provider in a hire-purchase transaction involving an imported car should be made to undertake such an onerous obligation. Hence, cl. 9.
- B The clause warranting title had no application to the facts of this case as the plaintiff did have good title to the car. It was not for want of title that the car was seized, but because the duties had not been paid. (para 3)
- C (2) The doctrine of frustration had no application to the facts of this case for the following reasons: (i) this was a case in which the parties specifically provided for the event relied on by the first defendant as promisor. It was to be found in cl. 3(b) of the hire-purchase agreement, which stated that “the
- D hirer (the first defendant) shall indemnify the owner (the plaintiff) against the destruction or loss of goods (including lawful forfeiture)”. Here, there was a lawful forfeiture by the Royal Customs and the risk of that happening was allocated to the first defendant by the contract. Thus, cl. 3(b) applied
- E and s. 57 of the Contracts Act 1950 (‘Act’) was excluded; and (ii) as aforementioned, it was for the first defendant to have ensured that the duties were paid by its agent. It did not, merely relying on its agent to make payment, which did not happen. So, if this was a case of frustration, then it was
- F self-induced. For that reason, s. 57 of the Act again did not apply. (para 8)
- (3) As for the second defendant, he promised that he would pay if the first defendant did not. Since the primary obligation to pay still stood undischarged and the first defendant refused to pay, the second defendant was liable on his promise. The
- G defendants, being in breach of their respective promises, could not possibly succeed in their counterclaim. (paras 9 & 10)

Bahasa Malaysia translation of headnotes

- H Ini adalah rayuan terhadap perintah Mahkamah Tinggi kerana memasukkan penghakiman untuk responden/plaintif dan menolak tuntutan balas perayu/defendan pertama. Defendan pertama telah membuat pesanan kepada Primakar Sdn Bhd (‘Primakar’) untuk
- I mengimport sebuah kereta BMW. Borang pesanan telah ditandatangani bagi pihak defendan pertama oleh pengarah urusannya, plaintif kedua, dan berikutnya defendan pertama memperoleh pinjaman dari plaintif bagi pembelian kereta. Plaintif

membeli kereta dari Primakar dan menyewanya kepada defendan pertama di bawah satu perjanjian sewa beli, di mana defendan kedua menjadi penjaminnya. Kemudian, kereta dirampas oleh pegawai-pegawai Kastam atas kesalahan gagal membayar cukai duti import. Walaupun begitu, ekoran kegagalan defendan pertama membayar ansuran bulanan kereta, plaintif memulakan tindakan terhadap defendan pertama bagi mendapatkan jumlah yang tertunggak di bawah perjanjian sewa beli. Defendan-defendan mengemukakan pembelaan utama bahawa plaintif telah menjual kereta yang ia sendiri tiada hakmilik, dan bahawa rampasan kereta telah mengecewakan kontrak sekaligus menyebabkan hak pihak-pihak perlu diubahsuai selaras dengan kehendak s. 15(3) Akta Undang-Undang Sivil 1956. Mereka juga memfail tuntutan balas atas kerugian yang dialami ekoran rampasan kereta tersebut. Yang arif hakim mendapati untuk plaintif atas kedua-dua isu dan menolak tuntutan balas, sekaligus menyebabkan rayuan semasa.

Diputuskan (menolak rayuan)

Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

- (1) Tidak syak lagi bahawa bagi maksud pengimportan kereta Primakar bertindak sebagai agen defendan pertama. Malah, kl. 9 perjanjian jual beli menjelaskan bahawa pengimport atau pengedar harus menjadi agen defendan pertama. Oleh itu, jika wujud obligasi bagi memastikan bahawa bayaran cukai kereta dibayar kepada Kastam, maka obligasi itu terletak atas Primakar sepenuhnya. Oleh kerana Primakar gagal membayar cukai tersebut, maka kegagalan itu adalah mengikat defendan pertama, dan bukannya plaintif. Ianya mengikut bahawa, atas pembacaan menyeluruh perjanjian sewa beli, tidak terdapat apa-apa janji oleh plaintif bahawa ia akan memastikan bahawa segala cukai akan dibayar. Dalam ketiadaan peruntukan jelas mengenai obligasi di dalam perjanjian sewa beli, mahkamah tidak boleh mengadakan peruntukan sedemikian kerana realiti komersial menuntut bahawa seorang pengeluar biaya dalam suatu transaksi sewa beli yang melibatkan kereta import tidak harus dibeban dengan obligasi yang sebegitu berat. Oleh itu, kl. 9, iaitu klausa yang memberi hakmilik, tidak terpakai kepada fakta kes di sini disebabkan plaintif tidak mempunyai hakmilik sah terhadap kereta. Kereta dirampas bukan kerana tiada hakmilik, tetapi kerana cukai tidak dibayar.

- A (2) Doktrin kekecewaan tidak terpakai kepada fakta kes ini atas alasan-alasan berikut: (i) Ini adalah kes di mana peristiwa yang menjadi sandaran defendan pertama sebagai promisor ada diperuntukkan secara spesifik oleh pihak-pihak. Ia terdapat pada kl. 3(b) perjanjian sewa beli, yang menegaskan bahawa
- B “penyewa (defendan pertama) hendaklah menggantirugi tuanpunya (plaintif) atas kerosakan atau kehilangan barang (termasuk rampasan yang sah)”. Di sini terdapat satu rampasan sah oleh Kastam dan risiko tersebut diletak atas defendan pertama oleh kontrak. Oleh itu, kl. 3(b) terpakai sementara s. 57 Akta Kontrak 1950 (‘Akta’) tidak terpakai;
- C dan (ii) seperti yang disebutkan, menjadi tanggungjawab defendan pertama untuk memastikan bahawa cukai-cukai dibayar oleh agennya. Ia tidak berbuat demikian, sebaliknya bergantung kepada agennya yang gagal membuat pembayaran.
- D Oleh itu, jika ini merupakan suatu kes kekecewaan, maka kekecewaan telah didorong dengan sengaja. Atas alasan ini, s. 57 Akta sekali lagi tidak terpakai.
- E (3) Berhubung defendan kedua, ia berjanji untuk membayar jika defendan pertama gagal berbuat demikian. Oleh kerana obligasi untuk membayar masih tidak ditunaikan dan defendan pertama pula enggan membayar, maka defendan kedua bertanggung atas janjinya. Setelah memungkiri janji-janji mereka masing-masing, tidaklah mungkin bahawa defendan-defendan boleh berjaya dalam tuntutan balas mereka.
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Case(s) referred to:

Central Bank of India Staff Co-operative Building Society Ltd v. Dulipalla Rao AIR [2004] AP 18 (refd)

Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors [2000] 3 CLJ 666 HC (refd)

Ocean Tramp Tankers Corp v. V/O Sovfracht [1964] 1 All ER 161 (refd)

Legislation referred to:

Civil Law Act 1956, s. 15(3)

Contracts Act 1950, s. 57

Courts of Judicature Act 1964, s. 42

Contracts Act 1872 [Ind], s. 56

For the appellants - LC Loh; M/s LC Loh & Co

For the respondent - Cheah Tien Eu; M/s Suhaimi Khor Zulkifli & Chang

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D2-23-1478-88]

Reported by Suresh Nathan

JUDGMENT**Gopal Sri Ram JCA:**

[1] This appeal is directed against the order of the High Court entering judgment for the plaintiff (respondent before us) against the defendants (appellants before us) and in dismissing the first defendant's counterclaim. The factual background against which this appeal rests is as follows.

[2] Primakar Sdn Bhd ("Primakar") is an importer and dealer of motor cars. The first defendant which is a private limited company placed an order for a BMW motor car for importation into this country. The order form was signed on the first defendant's behalf by its managing director the second defendant. The first defendant then obtained finance from the plaintiff for the purchase of the car. The plaintiff purchased the car from Primakar and let it to the first defendant pursuant to a hire-purchase agreement entered into between them. The second defendant guaranteed repayment. Later, the car was seized by officers of the Royal Customs for default in the payment of the actual duty payable on the car. The first defendant then defaulted in paying the instalments due under the hire-purchase agreement. The plaintiff brought an action against the defendants to recover the sums due under the hire-purchase agreement. The defendants' defended the action on the principal grounds (i) that the plaintiff had sold a car to which it had no title; (ii) that the seizure of the car frustrated the contract so that the parties' rights should be adjusted in accordance with s. 15(3) of the Civil Law Act 1956. In addition there was a counterclaim for the loss suffered by the seizure of the car. The learned judge found for the plaintiff on both points and, as I have already said, dismissed the counterclaim.

[3] The submissions made in the court below were repeated before us. After careful consideration I am satisfied that the learned judge was right and that this appeal must fail. My reasons are as follows. In the first place, there is no doubt – as found by the judge – that Primakar was acting as the first defendant's agent for the importation of the car. Indeed, cl. 9 of the hire purchase agreement makes it clear that the importer or dealer shall be the first defendant's agent. So, if there was any obligation to ensure that all duties payable on the car to Customs were paid squarely lay on Primakar. Since Primakar failed to pay the duties such failure would bind the first defendant: not the plaintiff. It follows that on a reading of the hire-purchase agreement as a whole, there

- A was no promise by the plaintiff that it would ensure that all duties due would be paid. In the absence of a clearly worded provision in a hire-purchase agreement imposing such an obligation, courts should not do so. For it does not accord with commercial reality that a finance provider in a hire-purchase transaction involving an
- B imported car should be made to undertake such an onerous obligation. Hence cl. 9. The clause warranting title has no application to the facts of this case as the plaintiff did have good title to the car. It was not for want of title that the car was seized. It was seized because duties had not been paid.
- C [4] With that I now turn to the second point in the case, namely the issue of frustration. Although this caused me some initial anxiety I have, after considering the relevant law, come to the conclusion that the doctrine has no application to the facts of
- D this case. The starting point is s. 57 of the Contracts Act 1950 which provides:
- (1) An agreement to do an act impossible in itself is void.
 - (2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
 - (3) Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, the promisor must make compensation to the promisee for any loss which the promisee sustains through the nonperformance of the promise.
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- F
- G [5] This section is *ipsissima verbis* s. 56 of the Indian Contract Act 1872. The latter was explained in the following terms in *Central Bank of India Staff Co-operative Building Society Ltd. v. Dulipalla Rao* AIR [2004] AP 18 by Yethirajulu J (Bilal Nazki J concurring):
- H The first paragraph of section 56 provides that an agreement to do an act impossible in itself is void. The second paragraph provides that a contract to do an act, which becomes unenforceable, if the act becomes: (a) impossible; or (b) by reason of some event which the promisor could not prevent. This section
- I also provides that it becomes so unenforceable when the act becomes impossible or unlawful. The first paragraph represents the law as in England. The second paragraph has the effect of turning into a general rule, the limited exceptions under English

law. The Act lays down positive rules of law on questions which English and American Courts have of late more and more tended to regard as matters of construction, depending on the true intention of the parties.

A

Frustration signifies a certain set of circumstances arising after the formation of the contract, the occurrence of which is due to no fault of either party and which renders performance of the contract by one or both parties physically and commercially impossible. The Court regards these sets of circumstances as releasing the parties from any further obligations. Where the entire performance of a contract becomes substantially impossible without any fault on either side, the contract is *prima facie* dissolved by the doctrine of frustration.

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C

The law excuses further performance under the doctrine of frustration, where the contract is silent as to the position of the parties in the event of performance becoming literally impossible or only possible in a very different way from that originally contemplated. The doctrine of frustration operates to excuse from further performance where (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that a particular person will continue to be available, or that some future event, which forms the basis of the contract, will take place; and (2) before breach, an event in relation to the matter stipulated in (1) renders performance impossible or only possible in a very different way from that contemplated, but without default of either party.

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[6] In *Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors* [2000] 3 CLJ 666, this court applied the following dictum of Lord Denning MR in *Ocean Tramp Tankers Corp v. V/O Sovfracht* [1964] 1 All ER 161 (CA):

It has frequently been said that the doctrine of frustration only applies when the new situation is 'unforeseen' or 'unexpected' or 'uncontemplated', as if that were an essential feature. But it is not so. It is not so much that it is 'unexpected', but rather that the parties have made no provision for it in their contract. The point about it, however, is that: If the parties did not foresee anything of the kind happening, you can readily infer that they have made no provision for it. Whereas, if they did foresee it, you would expect them to make provision for it.

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But cases have occurred where the parties have foreseen the danger ahead, and yet made no provision for it in the contract. Such was the case in the Spanish Civil War when a ship was let on charter to the Republican Government. The purpose was to evacuate refugees. The parties foresaw that she might be seized

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A by the Nationalists. But they made no provision for it in their contract. Yet, when she was seized, the contract was frustrated: see *WY Tatem Ltd v. Gamboa* [1938] 3 All ER 135. So, here, the parties foresaw that the canal might become impassable. It was the very thing that they feared. But they made no provision for it. So the doctrine may still apply, if it be a proper case for it.

B We are thus left with the simple test that a situation must arise which renders performance of the contract 'a thing radically different from that which was undertaken by the contract': see *Davis Contractors Ltd v. Fareham UDC* [1956] 2 All ER 145 at p 160; [1956] AC 696 at p 729, per Lord Radcliffe. To see if the doctrine applies, you have first to construe the contract and see whether the parties have themselves provided for the situation that has arisen. If they have provided for it, the contract must govern.

D There is no frustration. If they have not provided for it, then you have to compare the new situation with the old situation for which they did provide. Then you must see how different it is. The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound. It is often difficult to draw the line. But it must be done, and it is for the courts to do it as a matter of law: see *Tsakiroglou & Co Ltd v. Noblee & Thorl GmbH* [1961] 2 All ER 179 at pp 185, 187, [1962] AC 93 at pp 116, 119, per Viscount Simonds and per Lord Reid.

[7] It follows from the foregoing authorities that there are three elements woven into the fabric of the doctrine embodied in s. 57. First, the event upon which the promisor relies as having frustrated the contract must have been one for which no provision has been made in the contract. If provision has been made then the parties must be taken to have allocated the risk between them. Second, the event relied upon by the promisor must be one for which he or she is not responsible. Put shortly, self induced frustration is ineffective. Third, the event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by the contract. The court must find it practically unjust to enforce the original promise. If any of these elements are not present on the facts of a given case, then s. 57 does not bite.

- [8] Now test the facts of the present instance for these three elements and you will find two of them absent. First, this is a case in which the parties specifically provided for the event relied on by the first defendant as promisor. It is to be found in cl. 3(b) of the hire-purchase agreement which states that “the hirer (that is to say the first defendant) shall indemnify the owner (the plaintiff) against the destruction or loss of goods (including lawful forfeiture)”. Here there was a lawful forfeiture by the Customs. The risk of that happening was allocated to the first defendant by the contract. So cl. 3(b) applies and s. 57 is excluded. Second, as I have already said, it was for the first defendant to have ensured that the duties were paid by its agent. It did not. It merely relied on its agent to make payment. That did not happen. So, if this is a case of frustration then it was self induced. For that reason, again s. 57 does not apply.
- [9] As for the second defendant he promised that if the first defendant did not pay then he would. Since the primary obligation to pay still stands undischarged and the first defendant refused to pay, the second defendant is liable on his promise.
- [10] It follows from the preceding discussion that the defendants being in breach of their respective promises, their counterclaim could not possibly succeed. The judge was accordingly right in dismissing it.
- [11] For the reasons already given this appeal is dismissed. The respondents must pay the appellant the costs of this appeal. The deposit in court shall be paid to the respondent to account of its taxed costs. All the orders of the High Court are affirmed.
- [12] This is a case in which our learned brother Mohd Saari bin Yusof, JCA retired after we reserved judgment. Accordingly, this judgment is delivered pursuant to s. 42 of the Courts of Judicature Act 1964.
- [13] My learned brother Mohd Ghazali bin Mohd Yusoff, JCA has seen this judgment in draft and has expressed his agreement with it.